Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

From: Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Draft Request for an Advisory Opinion from the Federal Election Commission Regarding Preemption of State Rules for Reporting Mixed Expenditures by Political Party Committees on Federal and State or Local Elections

Date: October 18, 2005

Executive Summary

At the May meeting, staff proposed a new regulation to codify rules for reporting certain campaign receipts and expenditures by California political party committees. The regulation was intended to answer questions that have arisen over the past year on the often complex interaction between the state and federal laws governing these committees. Representatives of several political party committees persuaded the Commission that the proposed regulation might be pre-empted by federal law, and the Commission directed staff to return with a draft letter requesting an advisory opinion from the Federal Election Commission ("FEC") on the preemption question. The attached letter responds to this request.

Background

California political party committees are defined by the Act at section 85205:

> "Political party committee" means the state central committee or county central committee of an organization that meets the requirements for recognition as a political party pursuant to Section 5100 of the Elections Code.

These committees typically maintain from two to four bank accounts, registered as committees in their own right under state or federal law, depending on their sphere of activity. Thus a county central committee may receive and direct contributions into a "federal account," subject to the source and amount limitations and the reporting requirements of the Federal Election Campaign Act ("FECA"), which regulates funds used in federal political activities. The same committee may also receive and direct contributions into a "non-federal account," subject to the limits and reporting requirements of the Act, which regulate funds used in state and local activities. In addition, federal law permits political party committees to establish and maintain "Levin fund" and "allocation" accounts, to collect and disburse funds used for a mix of federal and state or local campaign activities.

The rules governing activities by California political party committees are well established insofar as they concern only state or local activities. But when these committees engage in activities regulated in part by our own Act, and in part by the FECA, the interplay between these two bodies of law is not always clearly outlined in federal or state law. Late last year Commission staff issued the *Boling* Advice Letter to address one such problem, and at the same time staff began fielding questions on state law treatment of "Levin funds," a then-new classification created by Congress in the Bipartisan Campaign Reform Act ("BCRA"). Under BCRA, Levin funds may be used by political party committees in certain federal *and* state or local activities, subject to state law. Congress gave detailed explanations for the use of such funds in federal activities, but left it to the states to integrate and regulate the use of such funds within their existing legal structures.

Staff thought that it would be useful to political party committees and their treasurers if the Commission were to adopt a new regulation answering certain questions that have recently arisen regarding specific interactions of federal and state law. The regulation would not involve a systematic restatement of applicable contribution limits and reporting obligations, but would address a limited number of circumstances where there is now some uncertainty regarding the proper application of existing state law. A summary of the *Boling* advice letter, followed by a description of how state and federal law interact in the use of Levin funds, will provide the Commission with essential background for staff's proposed regulation, and the question of federal preemption raised in May by representatives of California political party committees.

A. The *Boling* Advice Letter, No. A-04-212

In September 2004 April Boling sought advice from Commission staff in her capacity as treasurer of the San Diego County Republican Central Committee ("the SDCRCC"), a single entity controlling three bank accounts. One account was used to support or oppose federal candidates, and was registered as a federal recipient committee. A California general purpose committee managed the remaining two bank accounts; one to support or oppose state candidates and committees, and the second to support or oppose other candidates or issues.

Shortly before writing, the SDCRCC printed an advertisement urging Republicans to vote in the upcoming election, and providing them with a list of candidates and measures supported by the committee; the advertisement contained recommendations relating to federal as well as non-federal candidates. Federal law required that payment for this particular advertisement be made initially from federal funds, but permitted the federal account to be reimbursed from a state account to reflect the portion of the advertisement devoted to non-federal candidates and issues. However, federal law permitted a maximum reimbursement of 64 percent of the total cost, while the SDCRCC found that the true benefit to state candidates and issues amounted to 80 percent of the total cost. Because federal law prevented the state committee from paying the federal committee the full value (to the state committee) of the advertisement, the federal committee had effectively subsidized portions of the advertisement featuring state candidates and issues.

In the *Boling* letter, staff reconciled the federal reimbursement provision with the Act's general requirement that all state committee income and disbursements be reported, by advising that SDCRCC treat the federal committee's "subsidy" as a contribution from the federal to the state committee, in the amount of 16 percent of the cost of the advertisement. As required in such cases, the contribution would be allocated to contributors to the federal committee, the individual contributions being reported with the committee itself identified as an intermediary.

The problem highlighted in this letter is a recurrent one. To protect a federal interest in limiting the influx of non-federal funds into federal election activities, federal law governing mixed federal and state spending sometimes establishes a presumption that expenditures attributable to federal activities will *not* be less than a certain percentage of the whole. When reasonable accounting methods indicate that the federal presumption overstates the federal component in particular cases, state committee accounts can only be balanced by quantifying the difference between presumption and reality, and providing some means for state committees to report that difference. The *Boling* letter made it possible for the SCDRCC to satisfy its state reporting obligation in that particular case, while demonstrating the need for a regulation that other similarly-situated committees might consult in the future.

B. Levin Funds

One of Congress' principal goals in passing BCRA was to limit the role of "soft money" in federal elections.[1] A legislative compromise, the "Levin Amendment," attempted to reaffirm the traditional role of "soft money" by permitting contributions up to $10,000 per person per year to every federal political party committee, subject to strict limits on the usage of "Levin funds," as described at 11 CFR part 300 and summarized below.

State and local political party committees that have receipts or make disbursements for "federal election activities" (as defined in the FECA) may create up to four types of accounts: (1) a *federal account* for deposit of funds raised in compliance with FECA; (2) a *non-federal account* for deposit of funds governed entirely by state law; (3) an *allocation account* from which payments are made which may be allocated to both state and federal uses; and (4) a *Levin account*, for deposit of funds that comply with some of the limits and prohibitions of FECA, and which are also governed by state law. This section focuses on the rules governing Levin funds.

Levin funds may only be spent by the committee that raises them, and only on certain activities. The general rule is that state and local party committees must use federal funds to make expenditures and disbursements for any federal election activity. However, they may use Levin funds (which are non-federal) to pay for voter registration activity during the 120 days prior to a regularly scheduled federal election, along with generic campaign activity, voter

[1] "Soft money" refers to funds that could be donated to political parties without limit, ostensibly for use in traditional get-out-the-vote and other generic party-building activities, which nonetheless came to be used in the last decade overtly to fund federal election campaigns. Contributions intended for use in election campaigns ("hard money") were subject to strict limits whose utility was compromised by the surge in "soft money" campaigns.

identification, and get-out-the-vote drives run in connection with an election in which a federal candidate appears on the ballot. These are uses to which "soft money" was traditionally directed in the federal system.

Expenditures on federal election activities totaling more than $5,000 per annum must be paid entirely from a committee's federal account, or allocated between its federal and Levin accounts under formulas based on the candidates appearing on the federal ballot, which dictate a minimum federal allocation that serves as a "floor" that prevents under-estimation of federal expenditures. The rules are as follows:

(1) If a presidential candidate, but no senate candidate appears on the ballot, then at least 28 percent of any mixed federal-state expenditure must be allocated to the federal account;
(2) If both a presidential and a senatorial candidate appear on the ballot, then at least 36 percent of the expenditure must be allocated to the federal account;
(3) If a senate candidate, but no presidential candidate appears on the ballot, then at least 21 percent of the expenses must be allocated to the federal account;
(4) If neither a presidential nor a senatorial candidate appears on the ballot, the minimum federal allocation is 15 percent.

Levin funds may *not* be used to pay for any part of a federal election activity that refers to a clearly identified federal candidate, or for any television or radio communication, unless the communication refers solely to a clearly-identified state or local candidate. Levin funds also may not be used to pay any person who devotes more than 25% of compensated time in connection with a federal election. It should be noted that Levin funds may be used for communications, including television and radio broadcasts, which refer to clearly identified *state* candidates.

Each state and local party committee has a separate Levin fund contribution limit of $10,000 per person per annum. Levin funds must be raised and spent by the committee that maintains the particular account. Transfers and joint fundraisers are prohibited. Generally, fundraising costs may not be allocated, and no non-federal funds may be used to pay direct fundraising costs; non-federal and Levin funds must be raised using non-federal or Levin funds.

A federal committee must file monthly reports of all receipts and disbursements of federal funds for federal election activities, including the federal portion of allocated funds. As noted above, the FECA establishes minimum percentages that must be reported as spent on federal election activities. The reporting party may, of course, allocate and report higher percentages when appropriate, and there is no penalty for over-allocation to the federal side of the ledger. The federal goal is to eliminate from federal elections the influence of money raised outside federal source and amount limitations. This goal is served equally well by accurate allocation and by over-allocation, which indeed is sometimes *required* by minimum allocation formulas.

C. Proposed Regulation 18530.3

Staff's proposed regulation (attached) was intended to clarify and codify what staff regards as permissible and desirable rules integrating state and federal law governing political party committees as they engage in mixed state and federal activities. The regulation would address the specific problems identified in the *Boling* Advice Letter and the anticipated use of Levin funds by political party committees.

The proposed regulation opened by generally asserting the Act's jurisdiction over all contributions and expenditures of political party committees which are not within the jurisdiction of federal law. This assertion should be uncontroversial but for the possible objection that, since Levin accounts were created by federal law to serve an important federal interest – restricting the use of "soft money" in the federal system – the use of Levin funds should not be reportable or subject to limits under state law. However, federal law makes it clear that Levin funds must be raised and spent in compliance with federal *and* state law, and in particular federal law provides that Levin funds are subject to state contribution limits. (See 11 CFR 300.31.)

The proposed regulation would also codify the advice given in the *Boling* Advice Letter, providing that when a reimbursable federal expenditure also benefits state or local candidates or ballot measures, the un-reimbursed value is treated as a transfer of federal contributions to the state committee. The regulation emphasized that the determination of value to federal and state candidates must have a basis in fact, and cannot rest on an assumption that the minimum percentage allocated in all cases to federal candidates establishes the actual value to state or local candidates or measures. This section of the proposed regulation gave rise to an objection that it would be burdensome for political party committees to be compelled to do what Ms. Bolling did instinctively – to follow a federal rule for federal reporting, and a different state rule for state reports. Representatives of the regulated community then suggested that the federal rule might preempt any state rule directing that a different allocation formula be used in state reporting of the same activities.

Conclusion

The Commission decided that, before reviewing further drafts of a regulation that might be preempted by federal law, it would be prudent to seek an advisory opinion from the FEC on the preemptive effect of federal law on state reporting rules governing mixed federal and state campaign spending. An advisory opinion of the FEC would not be the final word on this topic, of course, since a court would be free to disagree if the question were litigated. But the opinion of the FEC would be entitled to substantial deference by the courts, and as a practical matter may greatly simplify rulemaking.